Supreme Court, U.S.
FILED
MAY 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5903

H_____L_____, etc.

Appellant,

v.

SCOTT M. MATHESON, et al.,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR APPELLEES

ROBERT B. HANSEN
Attorney General
PAUL M. TINKER
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Attorney for Appellees

TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 2

I. THE STATUTE AT ISSUE DOES NOT IMPROPERLY REGULATE OR INFRINGE UPON THE EXERCISE OF A PROTECTED PRIVACY RIGHT BY A MINOR, BUT RATHER CONSTITUTES A DE MINIMIS REQUIREMENT THAT DOES NOT UNDULY BURDEN EITHER THE MINOR OR HER PHYSICIAN 5

A. The statute requires mere notice and nothing further - the most minimal burden that could be imposed 5

B. The statute does not impinge on an abortion decision, but even if it does it can be justified by a rational relationship to a legitimate state purpose and it does not unduly burden the decision.....7

C. Absent this statute a significant parental interest may be nullified without even the basic due process element of notice, elevating abortion choice unwarrantedly to an absolute right.....9

D. The statute merely encourages parental involvement; it does not, indeed cannot compel it 14

E. The wisdom and social utility of such a statute should be addressed by the legislature rather than by this Court.....15

F. There is no constitutional requirement that parents must invariably act in the best interests of their child 17

G. The Constitution requires only that the government not interfere with an abortion decision, not that the woman be spared all negative consequences of making such a decision 19

H. The privacy right sought by Appellant collides unavoidably with a reserved, not delegated, right of families 21

II. THE STATUTE SERVES SIGNIFICANT STATE INTERESTS INCLUDING ENCOURAGEMENT OF THE INTEGRITY OF THE FAMILY UNIT AS THE BASIC SOCIAL ENTITY 23

A. The purpose of protecting family integrity is rationally served in this case by regulating one aspect of the practice of medicine 23

B. The encouragement of parental consultation, even though it cannot be compelled or guaranteed efficacious, is a legitimate state interest 26

C. The state furthers a legitimate interest in enforcing its criminal laws regarding sexual behavior through this statute 28

D. The situation of an emancipated minor presents a different case which is not presently before the Court, and should be disregarded 30

CONCLUSION 31

TABLE OF AUTHORITIES

Cases: *Page*

Akron Center for Reproductive Health Inc. v. City of Akron, 479 F. Supp. 1172 (N.D. Ohio 1979.....17

Bellotti v. Baird, 428 U.S. 132 (1976) 8

Bellotti v. Baird, U.S. (1979) .. 6, 12, 13, 15, 23

Boddie v. Connecticut, 401 U.S. 371 (1971).....10

Carey v. Population Services International, 431 U.S. 431 U.S. 678 8

Doe v. Bolton, 410 U.S. 179 (1973)..... 6, 11

Cases: *Page*

Doe v. Delaware, Docket No. 79-5932, (Jurisdiction noted March 24, 1980) 11

L R v. Hansen, Civil No. C-80-0078J, U.S.D.C. Utah (1980) 30

Maher v. Roe, 432 U.S. 464 (1977) 8, 9, 14, 15, 16

Margaret S. v. Edwards, F. Supp. (E.D. La. 1980) 17

Menillo v. Connecticut, 432 U.S. 9 (1975) 8

Moore v. Sims, U.S. (1979) 11

Moose Lodge #107 v. Irvis, 407 U.S. 163 (1972) 14

Parham v. J.R., 442 U.S. 584 (1979) 18, 23

Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976) 8, 27

Roe v. Wade, 410 U.S. 113 (1973).....6, 7, 8, 11

Whalen v. Roe, 429 U.S. 589 8

Women's Community Health Center Inc. v Cohen, 477 F. Supp. 542 (D. Maine 1979).....17

Wynn v. Carey, 582 F. 2d 1375 (7th Cir. 1978) 17

Constitutional Provisions:

Ninth Amendment, United States Constitution 22

State Statutes:

Section 15-2-1, Utah Code Annotated, 1953.....29
76-5-401, Utah Code Annotated, 1953.....28
76-5-402, Utah Code Annotated, 1953.....28
76-5-406, Utah Code Annotated, 1953.....29
76-7-102, Utah Code Annotated, 1953.....29
76-7-103, Utah Code Annotated, 1953.....29
76-7-104, Utah Code Annotated, 1953.....29
76-7-304, Utah Code Annotated, 1953.....31
78-3a-26, Utah Code Annotated, 1953.....27

Other Authorities

Watts, Parent, Child and the Decision to Abort: A Critique of the Supreme Court's Statutory Proposal in *Bellotti v. Baird*, 52 So. Cal. Law Rev., 1869 (1979) .....15..

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5903

H_____L_____, etc.

Appellant,

v.

SCOTT M. MATHESON, et al.,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR APPELLEES

SUMMARY OF ARGUMENT

The statute at issue in this case merely requires that a physician who is about to perform an abortion on a minor girl give notice to her parents, if possible, before the abortion is performed. This requirement does not improperly regulate or infringe upon the exercise of a protected privacy right, nor does it unduly burden the exercise of such a right. Rather it is a minimal requirement which does not violate any right of the minor or of her physician.

The requirement of notice — insuring mere knowledge on the part of the parents — is the most minimal requirement that could be imposed. This Court has previously said that even consent requirements may be imposed under certain limitations, but the Utah statute does not even go that far. If mere notice cannot be required, then the abortion choice for a minor will have been elevated to an absolute right against which no parental or familial right could ever be asserted, in contradiction to a longstanding body of jruisprudence which recognizes the integrity of the nuclear family as the basis of our society.

Without this minimal statutory protection of the family and parental relationship, a significant interest of parents can be terminated without the barest element of due process, namely notice, a result which would be unthinkable in almost any other context. The statute however, does not, indeed cannot, *require* parental involvement in the minor's decision-making; it can merely encourage such participation. A statute which merely encourages such involvement cannot be held unconstitutional under the prior rulings of this Court. While the statute may not actually further a goal of parental involvement in every case, that alone does not make the statute constitutionally deficient, and the wisdom or social desirability of such a statute is a matter which must be left to the legislature to decide.

Lower courts which have invalidated notice-only abortion statutes in other cases have either misunderstood previous rulings of this Court concerning consent requirements, or have sought to substitute their views of the wisdom of such laws for the views of the legislature. Additionally, such statutory schemes in other states were more complex and more burdensome than the Utah requirement.

There is a vast difference between a requirement that the state not impose directly or indirectly a veto power over an abortion decision, and the requirement sought by Appellant that the state seek to remove all potential negative consequences, even the psychological ones, from the path of a person seeking an abortion. This is especially true, when the consequences contemplated by Appellant are anticipatory only and will result, if at all, from private action by those persons with whom she shares an intimate family relationship. The privacy right identified in the abortion context must be tempered by these considerations when the person seeking an abortion is an unemcipated minor living at home.

The state does not here delegate any power to the family to prevent abortions. Rather it merely safeguards a reserved right which parents have to know of the important activities of their children by attempting to prevent a denial of the parental rights through deception.

In providing this security the statute serves foremost to preserve a right of families, but in so doing it furthers various state interests as well which justify the slight infringement, if any, on the privacy right of the minor. The principal interest is in maintaining family integrity as the basic social unit and decision-making body of society. The regulation of one aspect of the practice of medicine to accomplish this purpose is a logical and proper method of furthering this interest in the abortion context. Additional-

ly, the encouragement of parental consultation with a minor contemplating an abortion, even though it cannot be compelled by the state, is a legitimate state interest which is furthered by the statute. Also the state furthers an important interest in the enforcement of its criminal laws against improper sexual activity with minors.

Appellant has included in her brief certain material from the record of another case still pending in a lower court pertaining to the application of the statute to an emancipated minor. This presents a different issue from the one presently before the court and should be disregarded.

ARGUMENT

I

THE STATUTE AT ISSUE DOES NOT IMPROPERLY REGULATE OR INFRINGE UPON THE EXERCISE OF A PROTECTED PRIVACY RIGHT BY A MINOR, BUT RATHER CONSTITUTES A DE MINIMIS REQUIREMENT THAT DOES NOT UNDULY BURDEN EITHER THE MINOR OR HER PHYSICIAN.

A. The statute requires mere notice and nothing further - the most minimal burden that could be imposed.

The statute challenged here provides as follows, in the context of a section regulating abortions in the chapter, "Offenses aginst the Family" in the Utah Criminal Code:

> 76-7-304. *Considerations by physician — Notice to minor's parents or guardian or married woman's husband.* — To enable the physician to exercise his best medica! judgment, he shall:
>
> (1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,
>
> (a) Her physical, emotional and psychological health and safety,
>
> (b) Her age,
>
> (c) Her familial situation.
>
> (2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

This is an absolutely minimal requirement. It does not place any roadblocks in the way of a girl who has chosen to exercise her constitutionally-protected right to secure an abortion from a willing physician. It does not confer a veto power, either absolute or otherwise, on any third person. It is not unconstitutional according to any previous ruling of the Court. In order for Appellant to prevail here, this Court will have to find, as it has never previously found, that a state may not protect the integrity of the family relationship by requiring a minimal notification of parents *when possible* of an intended major surgical procedure to be performed on their minor daughter over whom they exercise care and custody. Such a ruling would not only be contrary to the entire course of jurisprudence relating to the sanctity of the family relationship, but it would also be inconsistent with what this Court has recently stated about the power of states to go so far as to impose even *consent* requirements for minors' abortions under certain limited circumstances. *Bellotti v. Baird*,____U.S.____, (Slip opinion, 20-21) (1979), (hereinafter *Bellotti II.)*

The burden, if any, imposed by this statute upon the exercise of an abortion decision by a pregnant minor is *de minimis*. On the other hand, the invasion of the rights of parents when their minor children are subjected by third parties to major surgery in total secrecy is substantial. Therefore, unless the abortion right is to be exalted, in the degree of protection afforded it, above almost any other right known in our society, including those explicitly stated in the Constitution, the challenged statute must be upheld.

Appellant suggests (Brief, p. 16-17) that because the statute in question also imposes limitations on the treating physician, it violates constitutional requirements identified in *Roe v. Wade*, 410 U.S. 113 at 163, and *Doe v. Bolton*, 410 U.S. 179 at 192 (1973), about the role of the doctor in the

abortion decision-making process. But those cases did not consider the peculiar circumstances involved when an unemancipated minor seeks an abortion. The entire thrust of the Utah statute is consistent with the historical reality that doctors have had less autonomy in directly exercising their professional judgment with respect to minors than they have with respect to adults. The limitation, if any, on the physician under the Utah scheme, is the most minimal limitation that could be created while still recognizing any interest at all on the part of the parents for their minor daughter. It is merely a requirement that the doctor notify the parents. All of the details as to how he notifies them, whether he engages in any further consultation with them, and whether he takes any information which they may give into account, are left to the exercise of his best medical judgment.

B. The statute does not impinge on an abortion decision, but even if it does it can be justified by a rational relationship to a legitimate state purpose and it does not unduly burden the decision.

The basic formula for evaluating statutes concerning abortion has evolved since 1973. In *Roe v. Wade, supra,* the Court held that the constitutional "right to privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. It was explained that this right, although fundamental, "is not unqualified and must be considered against important state interests in regulation." *Id.* at 154. The Court stated that "regulation limiting . . .(fundamental) rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155 (citations omitted). While the State has a valid interest in the mother's health, which becomes compelling after the

first trimester of pregnancy, and also a valid interest in the protection of a potential human life, which becomes compelling when the fetus becomes viable, (usually in the third trimester of pregnancy), *Id.* at 163-64, the Court concluded that during the first trimester "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician," *Id.* at 164, "free of interference by the State." *Id.* at 163.

Various decisions subsequent to *Roe* make clear that not all regulation of first trimester abortions is impermissible. If the challenged state action does not impinge upon a woman's decision to have an abortion and does not place obstacles in the path of effectuating that decision, the regulation need only be justified by a rational relationship to a legitimate state purpose. *Maher v. Roe,* 432 U.S. 464, 478-80 (1977) (limits on state funding for "non-therapeutic" abortion permissible). *Menillo v. Connecticut,* 423 U.S. 9, 11 (1975) (per curiam) (state criminal statute proscribing unlicensed physician from performing abortions does not impinge on abortion decision). If the regulation does impinge upon a woman's abortion decision or the means of effectuating it, the regulation still "is not unconstitutional unless it *unduly burdens* the right to seek an abortion." *Bellotti v. Baird,* 428 U.S. 132, 147 (1976) *(Bellotti I)* (emphasis added). See also *Maher v. Roe, supra* at 473-74. If the regulation unduly burdens the abortion decision, it must be justified by a compelling state interest. *Carey v. Population Services International,* 431 U.S. 678, 686, 688 (1977); *Roe v. Wade, supra* at 155. If, on the other hand, the regulation impinges upon the abortion decision without unduly burdening it, it must be sustained if it reasonably furthers a proper state purpose. *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 at 65-67, 80-81 (1976). Thus, "(a)s *Whalen (v. Roe,* 429 U.S. 589 (1977)) makes clear, the right in *Roe v. Wade* can be understood only by considering both the woman's interest

and the nature of the state's interference with it." *Maher v. Roe, supra* at 473.

While there is no question that the Utah statute applies to first trimester abortions as well as all others, Appellees here do not concede that the challenged statute impinges on a woman's decision to have an abortion or that it places obstacles in the path of effectuating such a decision. But even if it does, the statute can be justified by a rational relationship to a legitimate state purpose; and the legitimate state purpose significantly transcends the limited area of abortion decision-making.

Furthermore even if the statute should be held to impinge on an abortion decision or to place obstacles in the path of effectuating such a decision, it still does not *unduly burden* the decision and may thus be upheld without demonstrating a compelling state interest.

C. Absent this statute a significant parental interest may by nullified without even the basic due process element of notice, elevating abortion choice unwarrantedly to an absolute right.

One must stretch the imagination to an extraordinary degree to conjure up a situation where another important right or interest might be so summarily disregarded as appellant would have this court do by holding that parents need not ordinarily even be informed of major medical treatment to be performed on their minor daughter. The notion that a major interest of a person may be subverted or nullified without even the merest notice to the person so affected is a stranger to our jurisprudence. Even in this action, although the court below did not authorize the minor to obtain the abortion, it allowed her to proceed in court without notice to her parents. (A. 36). If this Court now rules that parents may not be notified

under Utah's statutory scheme when their daughter seeks an abortion, the Court will have effectively terminated the parental rights of an entire class of persons vitally concerned about the welfare of their daughters and will have done so without even the pretense of notice or due process for that class of persons.

The Court has been invited to indulge in all manner of speculation, nowhere supported in the record, to the effect that many parents generally and some parents in particular, do not act in their children's best interests when informed of a contemplated abortion. But where is the opportunity, heretofore required seemingly by axiom in our jurisprudence, for these very parents to respond to the allegations of their minor children and to say how they in fact will respond to the notification of a proposed abortion? Indeed by the very posture in which she has proceeded in the courts, appellant has effectively precluded her own parents and those like them from making a response to her allegations and by any rational standard has denied them what would otherwise be regarded as a most minimal due process of law.

If Appellant's reasoning in this case is converted into binding constitutional doctrine, then the same reasoning would ultimately require holding that notice to defendants in divorce cases is constitutionally impermissible because it can be shown, or surmised at least, that *some* defendants become violently abusive and visit bodily harm upon their spouses. Of course, this Court has never had occasion to hold that divorce *per se* is a fundamental right in the same sense as abortion has been found to be such (largely because divorce has not historically been prohibited in the way abortion was), but from the case regarding access to the courts for divorce, *Boddie v. Connecticut*, 401 U.S. 371 (1971), it is clear that the opportunity to seek a divorce is a vital interest which must be protected. In any case, the

parallel with respect to notification of a person potentially disadvantaged or distressed by the exercise of an important right by another is clear, and it would be a constitutional absurdity to suggest that the potentially negative (or even violent or abusive) reaction of the person so notified justifies proceeding to effectively terminate his interest while keeping him in total ignorance of the action. But this is precisely what Appellant suggests with respect to her action to exclude parents from any knowledge of her abortion.

Likewise the issue of how much process is due in the matter of terminating parental rights in the context of child abuse or neglect has been much litigated, *Moore v. Sims*,____U.S.____, (1979); *Doe v. Delware*, Docket No. 79-5932, (Jurisdiction noted March 24, 1980), but there is no reasonable suggestion that such a termination may be accomplished in total unawareness on the part of the parents. This is true even though a plausible argument can be made that initiation of proceedings to terminate parental rights may trigger violent or otherwise undesirable behavior on the part of some parents.

These comparisons should alert the Court to the serious dangers of elevating the right to choose an abortion above any or all other protected rights. While it is settled that the right to choose an abortion is a fundamental privacy right, protected by the Constitution, *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973), it has never been held that this right is absolute or that it must necessarily prevail over every imaginable competing interest. In *Wade*, the Court said, "The privacy right involved, therefore, cannot be said to be absolute." 410 U.S. at 154.

Our pluralistic society and government hardly permit any single right to be regarded as absolute, yet Appellant desires this Court to identify precisely such an absolute

right for a minor to choose an abortion. The proposed right collides unavoidably with an absolutely minimal, indeed irreducible, right of the parent to know of the proposed operation on their child. This is the right which the state seeks through its statutory scheme, to preserve in the context of a viable family structure and decision-making unit.

If the state cannot require mere notice to the parents, then it is difficult to conceive of any family interest that could ever be asserted vis-ā-vis the abortion right. If a medical doctor cannot be required by the state to inform parents of a serious medical procedure to be performed upon their minor daughter, it is hard to believe that the state could ever assert against the abortion right any influence whatsoever in support of parents on behalf of their children. The abortion right would indeed have become an absolute right.

But even the far-reaching decisions of this Court do not require such a result. This Court has in fact suggested that a state may indeed, "require a pregnant minor to obtain one or both parents' consent to an abortion," if it also provides "an alternative procedure whereby authorization for the abortion can be obtained." It is even hinted that such an alternative procedure might involve the juvenile court or an administrative agency or officer. *Bellotti II, supra,* (Slip opinion, 20, n. 22).

Utah, however, does not go so far as to require anyone's consent (except the pregnant minor herself) for an abortion. Utah merely requires the minor's parents to be notified, and does not so much as place a time limit on how soon after the notification an abortion may be performed.

Surely it is not logical to argue that the requirement of mere notification is somehow more invasive of the privacy right involved than a requirement that consent in fact be obtained either from the parents themselves or alternative-

ly from some third party who is a stranger to the child and to her circumstances, and who can probably be approached only through some bureaucratic process which further compounds the invasion of privacy. Utah's requirement is a *de minimis* requirement, even in the light of *Bellotti II* upon which Appellant primarily relies. The Massachusetts statute considered in *Bellotti* was significantly more burdensome than Utah's requirement because it was actually a consent requirement where notice to parents became involved as one of the steps along a path toward obtaining consent. The language in *Bellotti II* regarding notice should not be considered as controlling of Utah's mere notice statute, and the two kinds of schemes should be carefully distinquished.

A notion of absolute rights is problematical because it will lead to absurd results when measured against practical and just laws, commonly accepted and because, if there is an absolute right firmly identified somewhere, then it can by the *only* absolute right. Any right, however important, which conflicts with the one absolute right must necessarily fall. This Court should exercise great caution in identifying the right to choose an abortion as an absolute right or even as a first among equals.

In this case there is a conflict between rights. The right of a pregnant minor to choose, on her own, an abortion is arrayed against the right of the minor's parents to know of the significant activities of their child, especially of a major medical procedure. If this right of the parents cannot prevail here, then parents cannot assert any rights vis-ā-vis their children in the abortion context because there is no right imaginable less intrusive than the right to mere awareness.

What the parents may do beyond mere awareness is strictly within their own province and they act without the aid or blessing of the state. There is nothing in the record

of this case to indicate the actual behavior of parents beyond the point of awareness. There is only the speculation of the Appellant. Since no state action is involved in these anticipated parental reactions, there is no basis for Appellant's constitutional arguments against the statute. See *Moose Lodge #107 v. Irvis*, 407 U.S. 163 (1972).

If parents who are notified of proposed abortions undertake to prevent the free exercise of their daughter's choice or abuse or otherwise mistreat her, they probably violate rights or statutory provisions and would be subject to proper remedies in an appropriate case. But that is not the case before the Court. The Court is being asked to speculate as to what parents will do and thus to decide a matter which is not before it.

D. The statute merely encourages parental involvement; it does not, indeed cannot, compel it.

This Court has previously stated, when confronted with another aspect of the abortion dilemma, (public funding) that a different standard applies when the state merely encourages a particular result, as compared to when the state seeks to compel a result.

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader. *Maher v. Roe*, 432 U.S. 464, at 475-76 (1977).

In the present case it cannot reasonably be said that the State seeks to compel any particular result with respect to

a decision to choose an abortion. On the contrary, the State of Utah chooses explicilty to remain aloof from that difficult decision-making process, and certainly does not presume to involve itself through an alternative decision-maker as Massachusetts did in *Bellotti II.* (For a scholarly critique of the difficulties inherent in any system using an alternative decision maker, as well as a discussion of the vital role of parents, see Watts, *Parent, Child, and the Decision to Abort: A Critique of the Supreme Court's Statutory Proposal in Bellotti v. Baird,* 52 So. Cal. Law Rev., 1869 (1979).) Utah, on the other hand, seeks to merely encourage whatever minimal consultation or involvement parents in given cases may deem appropriate given the reality that they cannot ultimately control the decision.

Under the Utah statutory scheme there can be no "direct state interference with a protected activity," and if there occurs any actual undue interference by anyone, including the parents, with the protected activity, it would probably be actionable, either civilly or criminally under Utah law. This Court should not, under these circumstances, eliminate the minimal residual right of the parents merely to know of an abortion contemplated by their child. The case of a parent who subsequent to such knowledge acts in a way that is inappropriate is a case that is not before this Court.

E. The wisdom and social utility of such a statute should be addressed by the legislature rather than by this Court.

The question of whether a state could or should not require a minimal parental awareness of a minor's abortion decision is a question which presents issues "of policy and value over which opinions are sharply divided" in a way very similar to the question of funding of non-therapeutic abortions which the Court addressed in *Maher v. Roe, supra.* There the Court said, at 479-80:

> The decision whether to expend state funds for non-therapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided. Our conclusion that the Connecticut regulation is constitutional is not based on a weighing of its wisdom or social desirability, for this Court does not strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955), quoted in *Dandridge v. Williams, supra*, at 484. Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts' *Missouri, Kansas and Texas Ry. Co. v. May*, 194 U.S. 207, 270 (1904) (Holmes, J.).'

Appellant has argued essentially that the Utah law requiring notice to parents is an unwise statute because some parents will not act in their children's best interest when confronted with knowledge of a pregnancy or of a proposed abortion. Since the minimal requirements of the Utah statute regarding abortion notice do not violate any constitutional requirement previously identified by this Court and since they do not place any actual roadblock in the way of a minor seeking an abortion or unduly burden her right to choose an abortion, the Court should leave the difficult social and policy decisions about the wisdom of such a statute to the legislature in precisely the same spirit as suggested in *Maher, supra.*

Most of the arguments addressed by *amici* in this case,as

well as the lower court decisions involving notice-only statutes relied on by Appellant (*Margaret S. v. Edwards*, F. Supp. , (E.D. La. 1980, Civil Action No. 78-2765); *Akron Center for Reproductive Health, Inc. v. City of Akron*, 479 F. Supp. 1172 (N.D. Ohio 1979); *Women's Community Health Center, Inc. v. Cohen*, 477 F. Supp. 542 (D. Maine 1979); and *Wynn v. Carey*, 582 F. 2d 1375 (7th Cir. 1978)), will upon careful analysis be seen to constitute opinions about the wisdom or social desirability of a statute like Utah's. As pointed out above, it is beyond the province of this Court to review such a statute on the basis of its wisdom. Such a determination should be reserved to the state legislature which has the capacity to weigh the policy considerations at least as well as this Court can do so.

It should be noted also that these cases involved statutes that generally established schemes far more complicated or burdensome than Utah's, including consent provisions, time limitations, and other clear disincentives to abortion. The simplicity of the Utah requirement suggests persuasively that it is directed at least as much toward preserving family integrity in a theoretical sense and allowing parents to deal with the aftermath of an abortion decision as it is toward allowing parental involvement in any actual decision making.

F. There is no constitutional requirement that parents must invariably act in the best interests of their child.

The holding which Appellant seeks from this Court is in reality a holding that parents are required by the Constitution always to act in the best interests of their children, or at least that no statutory scheme under which parents might theoretically act other than in the best interests of their children may stand under the Constititution. That some parents fail in this regard cannot be doubted. That

all parents must therefore forego a requirement to be notified of their daughter's abortion decision is not logical and not required by the Constitution. As the Court has only recently observed in *Parham v. J.R.*, 442 U.S. 584 (1979):

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190.
>
> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their child" as was stated in *Bartley v. Kremens*, 402 F. Supp. 1039, 1947-1948, (E.D. Pa. 1975), vacated and remanded, 431 U.S. 119 (1977), creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. See Rolfe & MacClintock, 348-349. The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition. *Parham, supra at 602-603.*

A notion that no statutory scheme could stand if it allowed parents the possibility of acting contrary to the best interests of their children would be as unworkable as it would be contrary to history. The many legal disabilities

of minors operate inherently in such a way that parents must act in behalf of their children or make significant decisions for them in many instances. To expect that all such decisions will be made altruistically or with the child's interest uppermost in mind is certainly unrealistic. But the remedy sought by Appellant here would require this Court to assume, equally unrealistically, that doctors, or courts, or state agencies invariably are more prone to act in the child's best interests than parents are. Until parents have proven themselves irresponsible with respect to a particular instance of an abortion decision, the statutory presumption of their competency to be minimally involved in the process should stand.

G. The Constitution requires only that the government not interfere with an abortion decision, not that the woman be spared all negative consequences of making such a decision.

After all that has been said in this case, it perhaps is gilding the lily to state that the pregnancy of a minor is a matter fraught with problems and emotional consequences for many of the persons concerned with the well-being of the minor. Some of these problems do not admit of simplistic or doctrinaire solutions. While there is no reason to try to make these problems any more severe than necessary, it is likewise unrealistic and unjustified for Appellant to ask the courts to relieve her of all of the difficult or uncomfortable consequences of her situation. The Constitution has been deemed to require that the minor be afforded the privacy right to choose an abortion without a veto power of a third party. The Constitution has not been deemed to require, nor can it logically be so interpreted, that persons who exercise protected rights will not suffer some negative consequences for their choices, including such things as the disapproval or rejection of those around

them. Even an explicit constitutional right such as freedom of speech can only be extended so far as to say that the government may not deprive one of the opportunity of publicly espousing an unpopular view; the right cannot be extended to require that one's expressed views be met with approval, support and acceptance. Such a requirement would lead inexorably to the deprivation of a host of other rights.

Similarly, in the present circumstances, a minor may clearly demand that the state not interfere in any direct way, (or delegate such interference to a third party) with her decision to undergo an abortion. But by the same token it is illogical for the minor to insist that the state insure that she be spared all discomfiting consequences of her abortion decision. The state does not here require that the minor be made a public spectacle or held up to the ridicule of the neighborhood, which would indeed constitute a violation of a privacy right. The state does not even go so far as to require the minor to approach a tribunal or an administrative officer or agency for sanction of her choice. Rather the state merely requires that the treating physician grant the minor's parents the minimum awareness which constitutes the only remaining interest which parents can conceivably assert in the matter of their daughter's pregnancy. Absent such a minimal requirement the family relationship has effectively been declared a nullity with respect to such vital matters as medical treatment and value judgments regarding procreation.

Neither the minor's desire for privacy, which is only minimally infringed by notice that goes only to parents, nor her desire to avoid every negative consequence of her condition, rises to a level of interest requiring this Court to invalidate a state statute which does no more than recognize an historic and traditional integrity of the family unit.

H. The privacy right sought by Appellant collides unavoidably with a reserved, not delegated, right of families.

Essentially the privacy right identified in the abortion context is too sweeping a right to be asserted literally in the context of an unemancipated minor living at home, dependent on her parents. While it has been established that the right extends far enough to insure the exercise of the ultimate choice by the minor, if she is willing to accept the consequences of that choice, it goes too far to suggest that the unemancipated minor may make that choice in total secrecy from those who are charged with her well-being and support. If the privacy right is interpreted to mean that children may make major decisions about their own well-being by perpetrating a deception upon their parents, then the family relationship becomes meaningless as an instrumentality for the nurturing of children. Children have no reason to respect or give heed to any of the views of their parents, and parents have no means to convey their values or views on important subjects to their children. Parents are left with the mere financial burden of supporting their minor children without any concomitant authority to provide real guidance to those children as soon as the child's views on an important subject begin to diverge from those of the parent.

While as a general proposition it may not be unreasonable to say that privacy precludes requiring a woman seeking an abortion to divulge that fact to strangers, the state, or its agencies or tribunals, it does not follow that the same right precludes knowledge by the parents when the abortion is being sought by their minor daughter. Historically, sociologically and legally, the parents stand in a relationship to their child far different from the relationship that might be claimed between other parties (including the State) and an adult woman seeking

an abortion. It is difficult to comtemplate a relationship where the right of privacy as formulated in the abortion context could be less relevant than in the confines of the nuclear family.

In this regard it is important to keep in mind that the State of Utah, by its statutory requirement, does not require any notice be given to it or its agents, nor does it delegate any power to parents. The state, by its statute, has conceded that it has no power to place a roadblock in the way of a minor seeking an abortion or to veto her decision.

Furthermore, the state cannot delegate a power which it does not have. The statute, rather than being a delegation of some authority which the state has or claims to have, is merely a recognition and a protection of a power inherent in the family unit which does not derive from any governmental grant. Indeed, it may well be that this right of parents to be aware of major occurrences in the lives of their minor children is one of the rights reserved to the people under the Ninth Amendment to the Constitution. See the general discussion of this concept in *Griswold v. Connecticut*, 381 U.S. 479 (1965) at 486-499, Justice Goldberg concurring. If this be so, then it is inappropriate to regard the Utah statute as an attempt to delegate a state power to parents. On the contrary it becomes clear that the state is merely protecting the exercise of the familial right to the extent possible, without denying the exercise of the abortion right. It is difficult to see how a more fair balancing of these rights could be struck. Under almost any other formula, one right or the other would be effectively abolished.

II

THE STATUTE SERVES SIGNIFICANT STATE INTERESTS INCLUDING ENCOURAGEMENT OF THE INTEGRITY OF THE FAMILY UNIT AS THE BASIC SOCIAL ENTITY.

It seems unnecessary to review for this Court in great detail the fundamental nature of the family unit in the social and legal structure of this nation. Excellent discussions of this subject are found in at least two recent decisions of the Court, *Bellotti II, supra,* Part II, Slip opinion, 10-16, (1979) and *Parham v. J.R.*, ____U.S.____(1979). Additionally, the Court is respectfully referred to the extensive analysis of family integrity and the importance of protecting adolescents through family involvement in the *amicus curiae* brief in support of Appellees submitted on behalf of the Utah Association of Women by Professor Lynn Wardle. Suffice it to say that the Court, in harmony with our entire jurisprudence, has historically given the greatest deference to the rights of parents vis-ā-vis their children, without having to articulate those rights as emanating necessarily from any particular constitutional source. The Court has the opportunity in this case to continue to give substance to those familial prerogatives while not departing from the line of cases which preclude an undue burdening of the privacy right to choose an abortion. This is possible because the Utah requirement of mere notice to parents does not in fact impinge on the minor's protected right of decision-making, or if it does so at all, is so minimally burdensome that it is justified by a significant state interest in promoting the integrity of the family.

A. The purpose of protecting family integrity is rationally served in this case by regulating one aspect of the practice of medicine.

The fact that the Utah statute regarding notice to parents is included in a section of code regarding the regulation of medical practice for abortions does not diminish the fact that the ultimate rationale for the statute is predicated upon protection of family integrity; rather the location strengthens the notion.

The one person who must be aware of and involved in any woman's legal abortion is her physician. Physicians are subject to licensure and regulation by the state in numerous ways and generally may be regarded as aware of and sensitive to statutory conditions upon the practice of their profession. Thus, the physician becomes the logical point of control for the state to insure that family integrity is not subverted by a minor who seeks to deceive her own parents regarding an abortion. The physician is the person in the abortion process with both the kind of involvement and the kind of professional and legal responsibility to be an appropriate source of notification to the parent.

It is appropriate also that the physician be the person to actually give notice to the parent rather than requiring the minor to do so personally. The physician will be in a position to evaluate and judge any untoward parental reaction and if necessary direct the minor to other sources of professional or legal help in the event that some of the more drastic consequences envisioned by Appellant actually occur in some instances. The Utah law does not leave the minor without an advocate on behalf of her best interest in the case where her parents might default in this regard, but still the Utah law respects the privacy right to the greatest degree possible by involving the fewest persons while still accommodating the irreducible familial right of awareness.

To require a physician to make this minimal notification to parents cannot be said to infringe unjustifiably upon the physician's own exercise of his best medical judgment any more so than if the state were to require the doctor to take

the patient's temperature, medical history and blood pressure before performing the abortion. The fact that a doctor may consider one of these procedures unnecessary in a particular instance would not be persuasive in light of a reasonable state regulation requiring them in all cases. Similarly, the fact that a doctor does not feel notification is necessary in a particular situation is not sufficient to overturn a reasonable requirement that notification be given in all cases. The necessity of notification is not a matter for the doctor's professional discretion or sociological interpretation, but rather a legal requirement to protect minimal rights of others, which the state may legitimately impose.

The results of notification, on the other hand, may in fact inure to the benefit of the doctor in exercising his best medical judgment. The reaction of parents, as mentioned above, might be one such factor. Another such factor may well be additional information which the physician gains about the medical history of the minor. It is a reasonable supposition that minors in many cases are not aware of their own medical histories in great enough detail to give a physician sufficient data as to past diseases, drug reactions, allergies and family history to enable him to adequately assess the risks of surgery. The parent may be the only practical source of that necessary information. For the state to define the physician's best medical judgment in such a way as to provide the avenue to obtain such information is eminently reasonable.

Additional reasonable considerations supporting a notice requirement involve the issues of payment and medical complications. If a minor's parents cannot be notified of a proposed abortion, could they later be required to pay for it under their general duty to support their minor daughter? What if the minor can't or won't pay? To whom would the practitioner have recourse? Is

there perhaps an implied right of the minor to become a recipient of some form of public assistance, if payment were available from that source, without her parents' knowledge? Most governmental programs for assistance would require parental consent for eligibility and indeed would look to the parents, if they were financially able, to pay their child's expenses.

Similarly, what happens if there are medical complications of an abortion, such as hemorrhaging, after the fact? If she requires further treatment or is hospitalized, may the parents be then informed, including the reasons for the treatment? What if, in the rare but statistically identifiable case, the minor dies? Do the parents have any recourse against the physician who proceeded in total disregard of the parent's right to know?

B. The encouragement of parental counsultation, even though it cannot be compelled or guaranteed efficacious, is a legitimate state interest.

A more specific articulation of the interest which the state furthers by a notice requirement is that it may encourage parental consultation in the abortion decision. Members of the court have previously recognized this interest, noting that:

> There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender year, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending

> physician at an abortion clinic, where abortions for pregnant minors frequently take place. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, at 91, Justice Stewart concurring (1976).

This is not say that consultation will or must occur in every instance, nor is the statute defeated on constitutional grounds merely because such consultation does not occur in given cases or would be unproductive or unhelpful in other cases. The state merely *encourges* such consultation to take place; it does not, indeed cannot, compel such consultation. The entire matter of how to deal with the information provided to parents is left, as it should be, to be dealt with in the context of the family unit without any kind of intrusion from a governmental agency. The state has exercised the only real power which it legitimately now can exercise in this area by seeking to assure that parents are not left in ignorance of an abortion decision through deception on the part of their daughter.

If any inappropriate actions are taken by parents as a result of being notified of an abortion decision, the state may then have cause to intervene under its child abuse and neglect statutes. Such intervention is the appropriate limit for active state involvement in such matters, except to assure that parents are not deceived by their daughters with the assistance of a physician or an abortion clinic.

The Utah requirement of notice to parents before an abortion is performed on a minor is not conceptually different from the requirement that parents or guardians receive a summons in every case where a petition alleging delinquency, neglect or dependency is filed in the juvenile court of Utah, as required by Section 78-3a-26, Utah Code Annotated. In that situation, like the abortion situation, the minor has certain protected rights which he or she may exercise, but it is conceivable that parents may seek to in-

fluence the child's choices in exercising those rights. Like the abortion situation, the notice of pendency of an action in juvenile court may cause some parents to become angry or even abusive to their children (and the summons imparts more than mere knowledge or "encouragement" — it *requires* the parents to appear and otherwise become actively involved) but this possibility surely does not invalidate the statutory requirement of notice to all parents. A state statute that seeks to encourage a particular kind of activity is not defeated merely because it is less than universally effective, or because some undesired reactions occur.

C. The state furthers a legitimate interest in enforcing its criminal laws regarding sexual behavior through this statute.

The State has an additional interest in requiring parental notification of the abortion of a minor — an interest great enough almost to stand independent of the primary interest in maintaining family integrity in matters relating to private but important decisions of family members. This interest involves the detection and punishment of criminal behavior. Unless the pregnancy of an unmarried minor has resulted from some action or process other than that ordinarily thought of, it was in all probability the result of criminal behavior. Specifically under Utah law, if the girl is under 14, a felony of the First degree has been committed, to-wit; rape, under Utah Code Annotated, Section 76-5-402.

If the girl is between 14 and 16 years of age, the crime of unlawful sexual intercourse has been committed which is a felony of the Third degree under Section 76-5-401, Utah Code Annotated (or a class B misdemeanor if the perpetrator was no more than 3 years older than the victim.)

If the girl is between 16 and 18, the crime of rape may still have been committed (in this situation a felony of the second degree) if the victim did not consent to the act in the manner specified in Section 76-5-406, Utah Code Annotated.

In any case where a minor is involved, if her consent was not obtained, no matter what her age, a felony has been committed, and no valid consent is possible at all under the age of 14.

Since the girl is not married to the father (by definition, married girls under 18 are not minors under Utah law, Utah Code Annotated, Section 15-2-1) the additional crime of fornication (Section 76-7-104, Utah Code Annotated) or adultery, if the father was married to another, (Section 76-7-103, Utah Code Annotated) is involved. Moreover, in some cases the crime of incest, a felony of the third degree (Section 76-7-102, Utah Code Annotated) may also be involved.

In every case of a pregnancy of a minor in Utah (unless induced by an extraordinary or supernatural means) one or more of the crimes listed above is involved.

In every case of unmarried pregnancy under the age of 16 a crime has been committed. In the case of the Appellant either rape or unlawful sexual intercourse, depending on whether there was a valid consent, was committed.

In the reality of things there will seldom be an opportunity to identify the perpetrator or pursue appropriate criminal remedies unless parents become aware of their daughters' activities, albeit an undesired pregnancy may be in all too many cases the factor which occasions the parents' awareness. To say that parents have no entitlement to such awareness whatsoever, means that there is no effective mechanism for the enforcement of the State's criminal laws

in this important area and leads to the development of a profound and pervasive disregard for the duly enacted criminal laws of the state. The power sought by minor appellant to end her pregnancy in complete secrecy from her parents would lead, if granted, to a significant weakening, both symbolically and practically, of the state's ability to enforce its criminal laws.

D. The situation of an emancipated minor presents a different case which is not presently before the Court, and should be disregarded.

To the extent that Appellant now seeks to rely upon the fact situation in *L.R. v. Hansen,* (Civil No. C-80-0078J, United States District Court, Utah), (Appellant's Brief, 12-14, 19) the reliance is misplaced and has the effect of inviting the Court to rule upon a case that is not before it. In that case, Judge Jenkins determined from the testimony of the plaintiff herself that she was in fact emancipated and should be considered to have rights identical to an adult woman with respect to an abortion decision. For this reason he concluded, for purposes of a preliminary injunction limited to the named plaintiff only, that the provisions of the challenged statute were either unconstitutional as applied to the plaintiff or that they fail to apply to her as an emancipated minor.

That case presents an issue completely different from the present case and is in no way a part of the record here. The Court should disregard the situation of the emancipated minor and the case of *L.R. v. Hansen* in deciding the case before it which involves only the unemancipated minor, living at home, in the usual parent-child relationship.

CONCLUSION

For the reasons set forth above, as well as for the reasons set forth in the briefs *amicus curiae* submitted in support of Appellees by the Utah Association of Women and by Americans United for Life, the previsions of Section 76-7-304 (2), Utah Code Annotated, 1953, do not violate the Constitution of the United States. The Court should take this opportunity to clarify the sensitive subject of abortion regulation by upholding a statute which does nothing more than preserve a minimal parental right to awareness and to protection against deception in the abortion decisions of their minor daughters. The Court should affirm the unanimous ruling of Supreme Court of the State of Utah.

Respectfully submitted,

ROBERT B. HANSEN
Attorney General

PAUL M. TINKER
Assistant Attorney General